(19) (10) (11)

Supreme Court, U.S.
FILED
NOV 9 2001
CLERK

Nos. 00-1751, 00-1777 & 00-1779

IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent of Public Instruction, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF *AMICUS CURIAE* OF THE STATE OF WISCONSIN IN SUPPORT OF PETITIONERS

GORDON P. GIAMPIETRO
DONALD A. DAUGHERTY, JR
MICHAEL BEST
& FRIEDRICH LLP
100 East Wisconsin Avenue
Suite 3300
Milwaukee, WI 53202-4108
(414) 271-6560

STEPHEN P. HURLEY *
HURLEY, BURISH
& MILLIKEN, S.C.
301 North Broom Street
Madison, WI 53703-2067
(608) 257-0945

* *Counsel of Record for Amicus State of Wisconsin*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

38 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. TRUE PRIVATE CHOICE PROGRAMS SUSTAIN PARENTAL CHOICE IN MATTERS OF EDUCATION AND DEMONSTRATE THE ROLE OF THE STATES AS LABORATORIES OF DEMOCRACY	3
II. MILWAUKEE'S EXPERIENCE DEMONSTRATES THE DANGER OF EVALUATING THE CONSTITUTIONALITY OF A PRIVATE EDUCATIONAL CHOICE PROGRAM BASED ON A STATISTICAL "SNAPSHOT"	5
A. Wisconsin Enacted The MPCP To Create Educational Opportunities For Low-Income Families—Not To Advance Religion	6
B. The MPCP Continues To Grow And Offer Real Educational Choices	10
C. The MPCP Is Only One Of A Broad Range Of Educational Opportunities Available To Low-Income Families In Milwaukee	13
D. The MPCP Benefits Participating Families And May Improve The Public Schools	14

TABLE OF CONTENTS—Continued

Page

III. *SIMMONS-HARRIS* REPRESENTS A DEPARTURE FROM ESTABLISHMENT CLAUSE JURISPRUDENCE 18

A. Wholly-Neutral, Indirect-Aid Programs Do Not Violate The Establishment Clause 19

B. The Sixth Circuit Erred By Going Beyond The Plain Words Of The Ohio Statute 20

1. The Ohio Program is facially neutral and there is no evidence of a hidden intent to advance religion..... 22

2. It is of no constitutional significance that 96% of the students in the Cleveland Program attend religious schools 25

3. The Establishment Clause does not mandate any particular "decision matrix" 27

IV. THE EXCLUSION OF RELIGIOUS SCHOOLS WOULD RAISE SERIOUS QUESTIONS UNDER THE FREE EXERCISE CLAUSE 29

CONCLUSION..... 30

TABLE OF AUTHORITIES

CASES Page

Agostini v. Felton, 521 U.S. 203 (1997) ..... *passim*
Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) ..... *passim*
Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 2, 18, 19
Davis v. Grover, 166 Wis. 2d 501, 480 N.W.2d 460 (1992) 7, 9, 11
Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990) 22
Fletcher v. Peck, 6 Cranch 87 (1810) 23
Good News Club v. Milford Central School Dist., __U.S.__, 121 S.Ct. 2093 (2001) 19, 30
Jackson v. Benson, 218 Wis. 2d 835, 578 N.W.2d 602 (1998) ..... *passim*
Lemon v. Kurtzman, 403 U.S. 602 (1971) 19, 28
Meyer v. Nebraska, 262 U.S. 390 (1923) ..... *passim*
Mitchell v. Helms, 530 U.S. 793 (2000) ..... *passim*
Mueller v. Allen, 463 U.S. 388 (1983) ..... *passim*
New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) 2, 4
Pierce v. The Society of The Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925) 1, 2, 3, 4
Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000) ..... *passim*
United States v. O'Brien, 391 U.S. 367 (1968) 23
Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986) ..... *passim*
Younger v. Harris, 401 U.S. 37 (1971) 4, 5
Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) 18, 29

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

	Page
Wis. Stat. §§118.165(1)	9
Wis. Stat. §118.167	9
Wis. Stat. §119.23	5
Wis. Stat. §119.23(2)(a)1-2	7
Wis. Stat. §119.23(2)(a)4	9
Wis. Stat. §119.23(2)(a)5	9
Wis. Stat. §119.23(2)(b)1	7
Wis. Stat. §119.23(4)	7
Wis. Stat. §119.23(7)(am)	9
Wis. Stat. §119.23(7)(b)	9
1975 Wis. Laws ch. 220	14
1989 Wis. Act 336	6
1989 Wis. Act 336 §228	9
1993 Wis. Act 16 §2296	13
1995 Wis. Act 27, §§4002-4009	7, 8, 9

OTHER AUTHORITIES

Alan J. Borsuk, *Choice Program Tops 10,000*, Milwaukee Journal-Sentinel (October 24, 2001)	14
Howard L. Fuller & George A. Mitchell, *The Impact of School Choice in Integration in Milwaukee Private Schools* (Institute for the Transformation of Learning, Current Education Issues No. 2000-02) (June 2000)	16
Jay P. Greene, *et al.*, "School Choice in Milwaukee: A Randomized Experiment," *Learning From School Choice* (Brookings Institution Press, 1998)	16
Caroline M. Hoxby, "School Choice and School Productivity," Paper presented at National Bureau of Economic Research Conference on the Economics of School Choice (Feb. 23-24, 2001)	17

TABLE OF AUTHORITIES—Continued

Page

Institute for the Transformation of Learning, *The Milwaukee Parental Choice Program: Non-Religious and Religious School Participation* (October 2001) *http://www.schoolchoiceinfo.org/servlets/SendArticle/144/mpcpschtypes.pdf* 12, 13

Daniel McGroarty, "School Choice Slandered," *Public Interest* (Fall 1994) 15

Martha Minow, *Reforming School Reform*, 68 Fordham L. Rev. 257 (1999) 23

Press Release, Wisconsin Department of Public Instruction, *113 Schools Register to Participate in Milwaukee Parental Choice Program for 2001-02* (June 11, 2001) *http://www.dpi.state.wi.us/dpi/dfm/sms/pdf/mpc01pr.pdf.* 10, 11

Public Policy Forum, *Interdistrict Chapter 220: Changing Goals and Perspectives* (February 2000) *http://www.publicpolicyforum.org/josh/interdistrict220.pdf* 14

Cecilia Rouse, *Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program*, 113 Quarterly Journal of Economics 553 (1998) 16

Wisconsin Department of Public Instruction, *Charter Schools in Wisconsin http://www.dpi.wi.us/dpi/dfm/sms/csindex.html* 13, 14

Wisconsin Department of Public Instruction, *Milwaukee Parental Choice Program Facts and Figures for 2001-2002 http://dpi.state.wi.us/dpi/dfm/sms/mpcfnf01.html* 10, 11

TABLE OF AUTHORITIES—Continued

Page

Wisconsin Department of Public Instruction, *Milwaukee Parental Choice Program FAQ http://dpi.state.wi.us/dpi/dfm/sms/mpscfaq.html* 10

John F. Witte, "Achievement Effects of the Milwaukee Voucher Program," Paper presented at American Economics Association Annual Meeting (New Orleans, Jan. 1997) 16

John F. Witte, "Who Benefits from the Milwaukee Choice Program?" Fuller *et al.*, eds., *Who Chooses? Who Loses? Culture, Institutions and the Unequal Effects of School Choice* (New York: Teachers College Press 1996)..... 15

INTEREST OF AMICUS CURIAE [1]

Amicus State of Wisconsin implemented the Nation's first true private educational choice program in 1990 and then, in 1995, amended the program to include both religious and non-religious schools. Although *de jure* and *de facto* differences exist between the Milwaukee Parental Choice Program and the Ohio Pilot Project Scholarship Program, the constitutionality of such programs generally has been called into doubt by the Sixth Circuit's decision in *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000). Therefore, *Amicus* State of Wisconsin joins Petitioners in urging this Court to reverse the Sixth Circuit's decision in *Simmons-Harris*.

SUMMARY OF ARGUMENT

This Court long ago recognized both that education is a matter of "supreme importance" and that the child is not "the mere creature" of the State. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. The Society of The Sisters of The Holy Names of Jesus and Mary*, 268 U.S. 510 (1925). In both *Meyer* and *Pierce*, this Court turned back State laws that, in purpose and effect, sought to restrict parental authority in matters of education. Now, more than 75 years later, Petitioner State of Ohio and *Amicus* State of Wisconsin are called upon to defend modest educational reforms which have, as their purpose and effect, the goal of providing low-income, predominately minority parents with educational choices. What this Court recognized as hostility to parental choice in education more than 75 years ago appears today not in the laws of Ohio and Wisconsin, but in the Sixth Circuit's decision in *Simmons-Harris v. Zelman*.

---

[1] Pursuant to Supreme Court Rule 37.6, no person other than Counsel identified on the cover participated in authoring this brief. No entity other than the State of Wisconsin provided financial support for this brief. Further, the consent of the parties to the filing of this *amicus curiae* brief has been obtained and filed with the Clerk of the Court.

It is one of the "happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)(Brandeis, J., dissenting). The citizens of Ohio and Wisconsin have courageously chosen to experiment with educational reforms, of which private parental choice is one aspect, to bring hope and opportunity to millions of families. These reforms are not an expression of a state preference for religious instruction over non-religious instruction. Rather, consistent with the principles discussed in *Meyer* and *Pierce*, they seek to give parents the ability to decide what educational program works best—public, religious, non-religious, charter, etc.—for their children. Federalism requires that these modest educational experiments be given the chance to grow and develop.

Wisconsin's private choice program, the Milwaukee Parental Choice Program, although itself relatively new, provides a broader view of how a true private choice program works in reality, over time. That reality bears little resemblance to the assumptions found in *Simmons-Harris*. The Wisconsin experience is that private choice programs attract both religious and non-religious school participation, increase parental satisfaction, improve the educational performance of participating students, and may even spur educational reforms in the public schools. There is simply no empirical evidence from Wisconsin to support the Sixth Circuit's assumption that, in practice, private choice programs have the effect of endorsing religion or, more precisely, promoting religious education over non-religious education.

In addition to its unsupported factual assumptions, the Sixth Circuit's decision in *Simmons-Harris* cannot be squared with this Court's Establishment Clause jurisprudence. Relying solely on *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), the Sixth Circuit

ignored nearly all subsequent decisions of this Court which, if they can be summarized, teach that wholly neutral state programs that offer educational assistance to a class defined without reference to religion do not violate the Establishment Clause. *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 490-491 (1986)(Powell, J., concurring).

Finally, the proposed rule of constitutionality in *Simmons-Harris* raises serious concerns under the Free Exercise Clause. Under the Sixth Circuit's reasoning, if a facially-neutral program, for whatever reason, does not include some (unknown) percentage of non-religious participants, religious participants must be excluded. This converts the constitutional analysis from an inquiry into whether the *State* is favoring religion into a factual inquiry regarding the differing and ever-changing motivations of participating and non-participating *private* actors. Such a rule of constitutional law is fundamentally misdirected and would put courts in the impossible position—regardless of a statute's neutrality—of deciding which private actors to favor or disfavor.

ARGUMENT

I. TRUE PRIVATE CHOICE PROGRAMS SUSTAIN PARENTAL CHOICE IN MATTERS OF EDUCATION AND DEMONSTRATE THE ROLE OF THE STATES AS LABORATORIES OF DEMOCRACY.

This Court long ago recognized that the "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). Two years later, in *Pierce v. The Society of The Sisters of The Holy Names of Jesus and Mary*, 268 U.S. 510 (1925), this Court affirmed the "liberty of parents and

guardians to direct the upbringing and education of children under their control." 268 U.S. at 535-536. As stated therein:

> The child is not the mere creature of the state; those who nurture him and direct his destiny have the right coupled with the high duty to recognize and prepare him for additional obligations.

Id. at 536. These principles—the supreme importance of education and the centrality of parental authority—animate private educational choice programs. Private choice programs are not, as opponents claim, "attacks" on the public school system or "schemes" to funnel money to religious institutions. They are, rather, a re-affirmation of *Pierce*: parents are trusted to know what is best for their children.

Both *Meyer* and *Pierce* struck down State laws which, in their purpose and intent, imposed restrictions on parental choice in matters of education. Here, by contrast, Ohio wishes to expand parental educational choice for low-income families. Our federalist system encourages such experimentation. As Justice Brandeis wrote:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Of course, as Justice Black explained in *Younger v. Harris*, 401 U.S. 37 (1971), the ideal of federalism "does not mean blind deference" to the States. Rather, it means a "sensitivity to the legitimate interests of both State and National Governments." 401 U.S. at 44. And while the national government may be "anxious . . . to vindicate and protect federal rights and federal interests," it must do so in a way that "will not unduly interfere with the legitimate activities of

the States." *Id.* The creation of an educational program that provides low-income parents with the resources to carry out the "high duty" recognized in *Meyer* is a legitimate State activity.

Wisconsin, in keeping with its proud progressive tradition, established the Nation's first private educational choice program in 1990, and then expanded the program in 1995 to give low-income parents residing in the City of Milwaukee the option of sending their children to religious schools. Wisconsin's educational experiment, the Milwaukee Parental Choice Program, Wis. Stat. § 119.23, was upheld by the Wisconsin Supreme Court in *Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602 (1998), *cert. denied*, 525 U.S. 997 (1998). Ohio has now joined Wisconsin at the forefront of the Nation's efforts to resolve the educational crisis confronting millions of low-income and predominately minority children. These limited, modest and experimental programs, in keeping with the principles of our federalist system, must be given time to mature. To demonstrate the point, Wisconsin invites this Court to review the Wisconsin experiment as recounted below. The experience here in Wisconsin is that a maturing private educational choice program, within a larger context of educational reform, differs markedly from the "snapshot" assumptions about such programs made by the Sixth Circuit in *Simmons-Harris*.

II. MILWAUKEE'S EXPERIENCE DEMONSTRATES THE DANGER OF EVALUATING THE CONSTITUTIONALITY OF A PRIVATE EDUCATIONAL CHOICE PROGRAM BASED ON A STATISTICAL "SNAPSHOT."

Although it is itself relatively young, the Milwaukee Parental Choice Program ("MPCP") is the Nation's longest-running private educational choice program. Thus, much can be learned about how private choice programs operate, over time, by considering Milwaukee's experience.

Like the Cleveland program, the MPCP gives low-income parents in the City of Milwaukee access to a modest percentage of State education funds to give them the financial ability to enroll their children in whatever school, religious or non-religious, will best meet their needs. The development of the MPCP over the eleven years since it was first implemented shows how a private choice program can evolve and change over time. It further shows that, even when operating under the cloud of litigation, private choice programs can spur the development of educational reform and increase the number of options, including religious and non-religious schools, available to low-income families.

A. Wisconsin Enacted The MPCP To Create Educational Opportunities For Low-Income Families—Not To Advance Religion.

The Wisconsin Legislature enacted the original MPCP in 1989. *See* 1989 Wis. Act 336. The Legislature was responding to the dismal state of Milwaukee's public school system which, as in Cleveland, was plagued with problems. For example, in 1990, only 48% of the students who entered 9th grade at Milwaukee's public schools managed to graduate on time. (Appendix LL, Declaration of Dr. Howard Fuller [2] (hereinafter Fuller Decl.), ¶ 10, reproduced in the Joint Appendix ("JA") from 228a-236a.)

The MPCP was first implemented in the 1990-91 school year. As amended in 1993, the original MPCP permitted up to 1.5% of the student membership of the Milwaukee Public Schools ("MPS") to attend at no cost any private, non-religious school located in the City of Milwaukee, subject to

---

[2] Dr. Fuller served as the superintendent of Milwaukee Public Schools from June 1991 to June 1995. He is currently a Distinguished Professor of Education and the founder and Director of the Institute for the Transformation of Learning at Marquette University. (*See* Fuller Decl., ¶¶ 3 & 5, JA at 229a-230a.)

certain eligibility requirements. Wis. Stat. § 119.23(2)(b)1 (1993-94). Among the eligibility requirements were that the child be a student in kindergarten through twelfth grade and that the income of his or her family be less than 175% of the federal poverty level. *See id.* § 119.23(2)(a)1-2.

Under the original MPCP, the State provided funds directly to participating private schools. For each student attending a private school under the program, the State paid to each participating private school an amount equal to the state aid per student to which MPS would have been entitled under State aid distribution formulas. *See id.* at § 119.23(4).

The original MPCP was the subject of litigation, which included challenges under Wisconsin's Constitution, brought in June 1990 by opponents of the program. In *Davis v. Grover*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992), however, the Wisconsin Supreme Court confirmed its legality, and participation in the program grew. *See* Table 1 at p.11, *infra*.

After seeing the benefits of five years of educational experimentation, the Wisconsin Legislature amended the original MPCP in several important ways. *See* 1995 Wis. Act 27, § 4002-4009.

First, the Legislature removed the limitation that participating private schools be "nonsectarian," thereby allowing religious schools to participate. *See* 1995 Wis. Act 27, § 4002. Second, the Legislature added a religious "opt-out" provision, which prohibits a religious school from requiring "a student attending the private school under this section to participate in any religious activity if the pupil's parent or guardian submits to the teacher or the private school's principal a written request that the pupil be exempt from such activities." *Id.* at § 4008e.

Third, the Legislature further expanded the program by increasing the percentage of MPS membership allowed to participate in the program to 15%, and repealing the

limitation in the original MPCP that no more than 65% of a private school's enrollment consist of program participants. *See id.* at § 4003.

Fourth, the Legislature amended the MPCP so that, rather than paying the aid directly to participating schools, the State paid each participating student's parent or guardian. *See id.* at § 4006m. Under the amended MPCP, the State "send[s] the check to the private school" chosen by the parent or guardian, and the parent or guardian then "restrictively endorse[s] the check for the use of the private school." *Id.*

Fifth, the amended MPCP placed an additional limitation on the amount the State would pay to each parent or guardian. Under the amended MPCP, the State pays the lesser of the MPS per student aid amount calculated under the state aid distribution formula, or the private school's "operating and debt service cost per pupil that is related to educational programming" as determined by the State. *See id.*

Finally, the 1995 amendments addressed the issue of government oversight of the program, scaling back the authority of the State Superintendent of Public Instruction. The Legislature deleted the requirement of the original MPCP that the State Superintendent conduct annual, detailed performance evaluations of each participating school and report the findings to the Legislature, and it eliminated the Superintendent's authority to conduct multiple financial and performance evaluation audits of the program. *See id.* at §§ 4007m & 4008m. Indeed, as noted by the Wisconsin Supreme Court, because the amendments reduced the State Superintendent's oversight authority, the amended MPCP withstood an excessive entanglement challenge: "The program does not involve the State in any way with the schools' governance, curriculum, or day-to-day affairs. The State's regulation of participating private schools, while designed to ensure that the program's educational purposes

are fulfilled, does not approach the level of constitutionally impermissible involvement." *Jackson*, 218 Wis. 2d at 875, 578 N.W.2d at 620, ¶ 51.

Nonetheless, under the amended MPCP, participating schools were required to follow State accounting standards and file an independent audit. *See* 1995 Wis. Act 27 § 4007r (current version at Wis. Stats. § 119.23(7)(am) (2001)). Further, the State Superintendent retained the authority to exclude from the program in the next school year any school that failed to meet standards regarding at least one of the four following performance measurements—pupil grade advancement, average attendance, academic progress, or parental involvement.[3] *See* 1989 Wis. Act 336 § 228 (codified as amended at Wis. Stat. § 119.23(7)(b) (2001)). Finally, private schools that participate must comply with the laws that apply to all Wisconsin private schools (including regulations regarding instruction, curriculum and attendance, *see* Wis. Stat. §§ 118.165(1) & 118.167 (2001)), with health and safety codes, *see id.* § 119.23(2)(a)5, and with federal civil rights laws barring discrimination based on race, color, or religion, *see id.* § 119.23(2)(a)4.

The Legislature intended its expansion of the program to take effect in the 1995-96 school year. *See Jackson*, 218 Wis. 2d at 849 n.3, 578 N.W.2d at 609 n.3, ¶ 11. However, in August 1995, lawsuits were filed by the Milwaukee Teachers' Education Association and others challenging the amended MPCP under the State and Federal Constitutions. *See id.* at 850, 578 N.W.2d at 609, ¶ 12. A state court enjoined implementation of the amended MPCP before the start of the

---

[3] As the *Jackson* Court observed, another important source of accountability remained: "'Control is also fashioned with the [plan] in the form of parental choice . . . . If the private school does not meet the parents' expectations, the parents may remove the child from the school and go elsewhere.'" *Id.* at 899, 578 N.W.2d at 630, ¶ 100 (quoting *Davis*, 166 Wis. 2d at 544, 480 N.W.2d 460).

1995-96 school year. *See id.* at 849 n.3, 578 N.W.2d at 609 n.3, ¶ 11. After three years of litigation, the Wisconsin Supreme Court rejected both the State and Federal Constitutional challenges in *Jackson*, *supra*, and religious schools began participating in the MPCP in the 1998-99 school year.

Since the amendments in 1995, there have been few substantive changes to the MPCP. It remains targeted at children from low-income families: the limitation is still 175% of the federal poverty level, which, for the 2001-02 school year, represented $30,913 for a family of four. *See* Wisconsin Department of Public Instruction, *Milwaukee Parental Choice Program FAQ, at* http://dpi.state.wi.us/dpi/dfm/sms/mpscfaq.html. For the 2001-2002 school year, the value of an MPCP voucher was the lesser of $5,553 per pupil, or the school's audited per-pupil cost of education. *See* Wisconsin Department of Public Instruction, *Milwaukee Parental Choice Program Facts and Figures for 2001-2001, at* http://dpi.state.wi.us/dpi/dfm/sms/mpcfnf01.html. A maximum of roughly 15,500 students are allowed to participate in the MPCP. *See* Press Release, Wisconsin Department of Public Instruction, *113 Schools Register to Participate in Milwaukee Parental Choice Program for 2001-02* (June 11, 2001), *available at* http://www.dpi.state.wi.us/dpi/dfm/sms/pdf/mpc01pr.pdf. Parents of students participating in the MPCP retain the ability to have their children "opt out" of religious activities. Finally, schools remain accountable to the State through audits and performance evaluations, and they must comply with other state and federal laws.

B. The MPCP Continues To Grow And Offer Real Educational Choices.

As demonstrated by Table 1 below, since its inception in 1990, the MPCP has grown considerably, both in the number of participating schools and in the number of participating students.

Table 1.

MPCP Participation

	NUMBER OF PARTICIPATING SCHOOLS	NUMBER OF PARTICIPATING STUDENTS
1990-'91	7	341
1991-'92	6	521
1992-'93	11	608
1993-'94	12	733
1994-'95	12	802
1995-'96	17	1,454
1996-'97	20	1,657
1997-'98	23	1,545
1998-'99	86	6,088
1999-2000	93	8,049
2000-2001	103	9,638
2001-2002	113	10,739

Id.; see also Wisconsin Department of Public Instruction, *Milwaukee Parental Choice Program Facts and Figures for 2001-2002*, *supra*. This growth reflects not only the Legislature's expansion of the program and the program's increasing popularity among Milwaukee's parents and schoolchildren, but also the response of parents and schools to Wisconsin Supreme Court decisions in *Davis* (1992) and *Jackson* (1998). In the first school year after *Davis*, the number of pupils participating in the MPCP increased by 17% and the number of schools increased by 83%. Even more dramatically, from the 1997-98 school year to the 1998-99 school, the numbers of both students and schools in the MPCP quadrupled.

Furthermore (and to the extent the Sixth Circuit's concern in *Simmons-Harris* has any constitutional validity), over time there has been vigorous participation in the MPCP by non-religious schools. For example, in the 2001-02 school year, 34 non-religious schools participated in the MPCP, which was nearly five times the number that had participated in the first year. *See* Institute for the Transformation of Learning, *The Milwaukee Parental Choice Program: Non-Religious and Religious School Participation* (October 2001), *available at* http://www.schoolchoiceinfo.org/servlets/SendArticle/144/MPCPschtypes.pdf.[4] Of course, until the constitution-ality of the expanded MPCP was upheld in 1998 in *Jackson*, only non-religious schools could participate. Nonetheless, participation in the MPCP by non-religious schools has not decreased since religious schools were allowed to participate. As shown in Table 2 below, the mix of religious versus non-religious schools has remained stable:

Table 2.

Percentage of Schools Each Year

School Year	Non-religious	Religious
1998-99	32%	68%
1999-00	32%	68%
2000-2001	33%	67%
2001-2002	32%	68%

Id. Similarly, even after the inclusion of religious schools, substantial growth has continued in the number of students enrolled in non-religious schools: from 2,048 in 1998-99, to 2,618 in the 1999-2000 school year, to 3,219 in the 2000-01

[4] The few, slight discrepancies between the numbers reported by the State Superintendent and by the Institute for the Transformation of Learning ("ITL") are explained at the ITL's website. *See* Institute for the Transformation of Learning, *The Milwaukee Parental Choice Program: Non-Religious and Religious School Participation, supra.*

school year, to 3,582 in the current school year. *Id.* Today, approximately one-third of the students participating in the MPCP attend non-religious schools. *Id.*

As discussed below in Section III(B)(2), *Amicus* State of Wisconsin does not believe the relative percentages of non-religious/religious school participation is relevant to the constitutional question. However, assuming *arguendo*, that relative percentages are of relevance, the current Milwaukee breakdown (32% non-religious, 68% religious) would seem to foreclose the argument that the State of Wisconsin is endorsing religion. Moreover, it is inappropriate to consider private choice programs in isolation. Private choice programs are merely one of numerous educational experiments, and must be viewed in relation to the other choices available to low-income families.

C. The MPCP Is Only One Of A Broad Range Of Educational Opportunities Available To Low-Income Families In Milwaukee.

As in Cleveland, the range of non-religious schools choices includes not only the public schools and those non-religious schools that participate in the private choice program, but also "Charter Schools." Wisconsin's Charter Schools are similar to Cleveland's "Community Schools." Charter Schools are public, non-religious schools created by charters between a school's operator and the sponsoring school board or other chartering authority. *See* Wisconsin Department of Public Instruction, *Charter Schools in Wisconsin, available at* http://www.dpi.wi.us/dpi/dfm/sms/csindex.html. Wisconsin charter school law gives Charter Schools freedom from most State rules and regulations in exchange for greater accountability for results. The Wisconsin Legislature first authorized the establishment of Charter Schools in Wisconsin in 1993. *See* 1993 Wis. Act 16 § 2296. In Milwaukee, there are approximately 12 Charter Schools with approximately 3,300 students enrolled in them for the 2001-02 school

year. *See* Alan J. Borsuk, *Choice Program Tops 10,000*, Milwaukee Journal-Sentinel, October 24, 2001, at B1; *see also* Wisconsin Department of Public Instruction, *Charter Schools in Wisconsin*, *supra*.

In addition to Charter Schools, Milwaukee schoolchildren have options available to them under Wisconsin's "Chapter 220" program. In an effort to foster greater racial integration in Milwaukee-area public schools, in 1976, the Legislature provided that Milwaukee's minority children could attend public schools located in the suburban communities surrounding Milwaukee. 1975 Wis. Laws ch. 220. In the 1999-2000 school year, approximately 5,500 students from Milwaukee attended public schools in the 23 suburbs surrounding the city. *See* Public Policy Forum, *Interdistrict Chapter 220: Changing Goals and Perspectives* (February 2000), *available at* http://www.publicpolicyforum.org/josh/interdistrict220.pdf. This voluntary program provides another source of public school alternatives for parents and students.

In addition to the public schools, MPCP schools, Charter Schools, and the Chapter 220 program, further educational options available to Milwaukee parents and their children include specialty (or "magnet") schools and, for students who are considered to be at-risk, alternative schools (including private schools under contract with MPS). (Fuller Decl., ¶ 20, JA at 235a-236a.)

In light of such alternative schooling options, it would be inappropriate to draw conclusions about the "decision matrix" (*Simmons-Harris*, 234 F.3d at 960) available to Milwaukee parents without giving consideration to the larger context of educational reform. The same is true for Cleveland parents.

D. The MPCP Benefits Participating Families And May Improve The Public Schools.

Because it is the Nation's oldest private educational choice program, numerous studies have examined the MPCP, its participants, and its effect on Milwaukee public schools.

Although there is some disagreement among scholars as to specifics, there is a growing consensus that the MPCP works.

For example, studies have uniformly concluded that parents of MPCP students are much more satisfied with the education that their children are receiving than the parents of students at MPS schools. (Appendix P, Affidavit of Paul E. Peterson,[5] JA at 117a (hereinafter Peterson Affidavit) (citing John F. Witte, "Who Benefits from the Milwaukee Choice Program?," in Fuller, *et al.* eds., *Who Chooses? Who Loses? Culture, Institutions and the Unequal Effects of School Choice*, at *132* (New York: Teachers College Press, 1996), *see also* Fuller Decl., ¶ 9, JA at 231a.) A three-year evaluation of the MPCP's effects found that "'choice parents were more satisfied with choice schools than they had been with their prior public schools and more satisfied than [MPS] parents with their schools . . . . Attitudes were more positive on every item, with "discipline in the school" showing the greatest increase in satisfaction.'" (*Id.*)

Similarly, research by Partners Advancing Values in Education, a privately-funded scholarship program in Milwaukee, indicates that school choice substantially reduces student mobility, which measures the number of students who move from one school to another: in MPS, student mobility is about 30%, while only about 6% of MPCP parents move their children from one school to another. (Fuller Decl., ¶ 9, JA at 231a; *see also* Peterson Affidavit, JA at 113a (citing Daniel McGroarty, "School Choice Slandered," *Public Interest*, at 94-111 (Fall 1994)).) Research also shows that

---

[5] Paul E. Peterson is the Henry Lee Shattuck Professor of Government and the Director of the Program on Education Policy and Governance at Harvard University. He is a former Director of the Governmental Studies program at the Brookings Institution, and the author or editor of several books and numerous articles about education reform, including school choice. *See* Peterson Affidavit, JA at 74a.

parents who exercise choice are not only more satisfied than public school parents, but they also become more involved in their children's education. (Fuller Decl., ¶ 9, JA at 231a.)

Furthermore, in a study responding to predictions of negative effects caused by the MPCP's expansion, one study showed that since the addition of religious schools, there has been greater racial integration in MPCP schools than in MPS. *See* Howard L. Fuller & George A. Mitchell, *The Impact of School Choice on Integration in Milwaukee Private Schools*, at 1 (Institute for the Transformation of Learning, Current Education Issues No. 2000-02) (June 2000). This conclusion is consistent with the results of other studies that reinforced the basic thesis that "choice programs targeted at low-income families likely will increase integration." *Id.* at 8.

With regard to academic achievement, three separate studies have examined the impact of the MPCP on student learning. (Peterson Affidavit, JA at 107a.) One concluded that, after participating for three and four years in the MPCP, students achieved higher scores in both mathematics and reading than students who remained in public schools. (*Id.* (citing Greene, *et al.*, "School Choice in Milwaukee: A Randomized Experiment," *Learning From School Choice* (Brookings Institution Press, 1998)).) Another study found no differences in the reading or math scores of MPCP students and public school students. (Peterson Affidavit, JA at 107a (citing John F. Witte, "Achievement Effects of the Milwaukee Voucher Program," Paper presented at American Economics Association Annual Meeting (New Orleans, Jan. 1997), *remaining citations omitted*).) The third study found higher mathematics scores, but not in reading. (Peterson Affidavit, JA at 107a (citing Cecilia Rouse, *Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program*, 113 Quarterly Journal of Economics, 553-602 (1998)).) In sum, all studies have concluded that students in MPCP schools perform at least as well as those in public schools, and two of the three found

that the comprehension of mathematics by MPCP students was greater than that of MPS students. (Peterson Affidavit, JA at 108a.)

Finally, data from Milwaukee suggests that benefits from the MPCP inure to the children whose parents choose to continue their education in the public schools. For example, per pupil spending for students in Milwaukee's public schools has actually increased because students who left to participate in the MPCP took with them less than total per-pupil funding. (Fuller Decl., ¶ 16, JA at 233a-234a.) Similarly, in 1999, MPS took the following steps: 1) it sought to encourage parents of young children to attend public schools by promising in radio advertisements that MPS would hire private tutors if students were not able to read at grade level by third grade; and 2) it responded to long-standing requests for more new schools specializing in popular programs, such as Montessori. (Fuller Decl., ¶ 17, JA at 234a.) Moreover, a recent study of the effects of competition on public schools found that

> [o]verall, an evaluation of Milwaukee suggests that public schools have a strong, positive productivity response to competition from vouchers. The schools that faced the most potential competition from vouchers had the best productivity response. In fact, the schools that were most treated to competition had dramatic productivity improvements.

Caroline M. Hoxby, *School Choice and School Productivity*, at 40, Paper presented at National Bureau of Economic Research Conference on The Economics of School Choice (Feb. 23-24, 2001). Thus, there is strong reason to conclude that MPS schools may also improve because of the MPCP.

The growth and expansion of the Milwaukee private choice program shows a positive trend on many levels. In short, at this early stage of the educational experiment, a body of evidence has developed that tends to prove the theory behind parental choice in education. At the very least, there is

nothing in the Milwaukee experience to suggest that Milwaukee families have been presented with a "decision matrix [which] yields a limited and restricted palette" from which to choose. *See Simmons-Harris*, 234 F.3d at 960. Therefore, while Wisconsin rejects the Sixth Circuit's interpretation and application of Establishment Clause precedent—i.e., that a facially neutral statute can be rendered unconstitutional by the choices of non-governmental third parties—the Milwaukee experience is that private choice programs provide real choice and, therefore, real hope to low-income parents.

Amicus State of Wisconsin respectfully asserts that the foregoing discussion of the Milwaukee experience underscores two fundamental errors in *Simmons-Harris*. First, private choice programs cannot be judged apart from the larger context of other educational reforms. And second, it is inappropriate to decide the constitutionality of a private choice program by a statistical "snapshot" taken while the program is young and is operating under the cloud of litigation.

III. *SIMMONS-HARRIS* REPRESENTS A DEPARTURE FROM ESTABLISHMENT CLAUSE JURISPRUDENCE.

This case presents a First Amendment Establishment Clause question, reserved by this Court in *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 782-783, n.38 (1973), but directly answered in *Mueller v. Allen*, 463 U.S. 388 (1983), and seemingly re-answered by *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997); and *Mitchell v. Helms*, 530 U.S. 793 (2000). The issue here is whether the Ohio Pilot Project Scholarship Program is a "true private-choice program" and, therefore, permissible under this Court's Establishment Clause jurisprudence. *Mitchell*,

530 U.S. at 842 (O'Connor, J., concurring). Or whether, on the *sole* factual basis that 96% of the participating students *currently* attend religious schools, the "religious indoctrination that occurs in these schools could reasonably be attributed to" the State of Ohio. *Mitchell*, 530 U.S. at 809 (citing *Agostini*, 521 U.S. at 226).

Amicus State of Wisconsin respectfully asserts that the Ohio Pilot Project Scholarship Program—regardless of where parents have chosen (or will choose) to send their children—is a "true private-choice program" and, therefore, the Sixth Circuit's decision must be reversed.

A. Wholly-Neutral, Indirect-Aid Programs Do Not Violate The Establishment Clause.

What was reserved in *Nyquist* was "made clear" in *Mueller*:

> State programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries. *Mueller*, 463 U.S., at 398-399, 103 S.Ct., at 3068-69.

Witters, 474 U.S. at 490-491 (Powell, J., concurring).

The parties can be expected to thoroughly brief the development of this Court's Establishment Clause jurisprudence from *Lemon v. Kurtzman*, 403 U.S. 602 (1971) through *Good News Club v. Milford Central School Dist.*, __U.S.__, 121 S.Ct. 2093 (2001). Therefore, *Amicus* State of Wisconsin will not present another discussion of *Agostini*'s refinement of the three-part test adopted in *Lemon*. *Agostini*, 521 U.S. at 232-234; *Mitchell*, 530 U.S. at 807-808. Nor is it necessary to examine the disagreement between the plurality and concurring opinions in *Mitchell*, *supra*. That disagreement, which relates to the relative value to be assigned to the "neutrality" factor in direct aid cases, need not be resolved in

this *indirect* aid case. Indirect aid programs, as Justice O'Connor explained in *Mitchell*, negate the inference that the State is advancing religion.

> [W]hen the government provides aid directly to the student beneficiary, that student can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education. The fact that aid flows to the religious school and is used for the advancement of religion is therefore *wholly* dependent on the student's private decision.

530 U.S. at 842 (O'Connor, J., concurring)(emphasis in original). In short, the issue is whether a "reasonable observer" could infer "that the State itself is endorsing a religious practice or belief." 530 U.S. at 843 (O'Connor, J., concurring) (quoting *Witters*, 474 U.S. at 493). This view commands a clear majority of this Court. As the *Mitchell* plurality explained:

> the question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action.

530 U.S. at 809 (internal citations omitted). For this reason, whatever disagreements exist between the plurality and the concurring Justices in *Mitchell*, there is agreement on the principle that governs this case: wholly neutral, indirect aid programs do not violate the Establishment Clause.

B. The Sixth Circuit Erred By Going Beyond The Plain Words Of The Ohio Statute.

Turning then to *Simmons-Harris*, the Sixth Circuit's decision fails the "reasonable observer" test, both as to the law and the factual record before it.[6] With respect to the law,

---

[6] *Amicus* State of Wisconsin does not use the phrase "reasonable observer test" in any formal sense. Rather, the phrase captures what seems to be the touchstone of the inquiry in these cases.

Simmons-Harris suggests—although it stops short of actually saying it—that the Ohio Legislature had some hidden *intent* to create a private choice program in which only religious schools could (or would) participate. The Sixth Circuit's point of departure—to go beyond the words of the facially-neutral Ohio statute—is this Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

Another legal error, related to the first, was the Sixth Circuit's examination of and reliance upon the relative percentages of religious school participation (82%) and student matriculation at religious schools (96%). In doing so, the Sixth Circuit gave dispositive weight to an argument that was unambiguously rejected in *Mueller*, 463 U.S. at 401, *Witters*, 474 U.S. at 491 (Powell, J., concurring) and *Agostini*, 521 U.S. at 229-230.

Finally, as the basis for its holding that the Ohio voucher program "has the primary effect of advancing religion," the Sixth Circuit found that Cleveland parents were offered only "a limited and restricted palette" from which to choose. *Simmons-Harris*, 234 F.3d at 960.

But there is no factual support in the record for any of the Sixth Circuit's assumptions. For example, there is no evidence that a single non-religious school chose not to participate because the private choice program's tuition level is too low. *Simmons-Harris*, 234 F.3d at 959. Similarly, there is no evidence that a single participating (or non-participating, but eligible) family thinks that the private choice program offers a "limited and restricted palette." *Id.* 234 F.3d at 960. Although *Amicus* State of Wisconsin views them to have little importance to the Establishment Clause question, the Sixth Circuit's assumptions are in any event without evidentiary support.

Amicus State of Wisconsin will address each of these failings in turn.

1. *The Ohio Program is facially neutral and there is no evidence of a hidden intent to advance religion.*

Because the Ohio private educational choice program is, on its face, "wholly neutral in offering educational assistance to a class defined without reference to religion" (*Witters*, 474 U.S. at 490-491), the Sixth Circuit's Establishment Clause inquiry should have come to a swift conclusion. Instead, relying solely upon *Church of the Lukumi Babalu Aye*, *supra*, the Sixth Circuit went beyond the words of the statute to conclude that the private choice program lacks "neutrality" and "general applicability." *Church of the Lukumi Babalu Aye* is easily distinguishable.

In *Church of the Lukumi Babalu Aye*, this Court held that certain City of Hialeah ordinances prohibiting animal sacrifice were not "neutral" and were not of "general applicability" as required by *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). This Court found "subtle departures from neutrality" and "covert suppression of particular religious belief" as reflected by *both* the plain words of the ordinances and certain statements made by City Council members. *Id.* This Court explained that it "must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id.* (internal quotations omitted).

In its examination of the plain words of the ordinances, this Court noted that the "pattern of exemptions parallels the pattern of narrow prohibitions. Each contributes to the gerrymander." *Id.* at 537. In other words, the ordinances function "to suppress Santeria religious worship." *Id.* at 540. In addition to the ordinances' plain words—which targeted only the Santeria religion—this Court examined the evidence of record on the question of "discriminatory object." *Id.* That evidence consisted of statements by residents, Council members, and City officials which further confirmed

"the object of the ordinances to target animal sacrifice by Santeria worshippers because of its religious motivation." *Id.* at 542.[7]

Church of the Lukumi Babalu Aye is not relevant here. The Ohio private choice statute does not, on its face, advance religious over non-religious schools. Unlike *Church of the Lukumi Babalu Aye*, there is no facial "gerrymander." Rather, according to the Sixth Circuit, the private choice program allegedly, in practice, "discourages the participation by schools not funded by religious institutions[.]" *Simmons-Harris*, 234 F.3d at 959. And it does this, the Sixth Circuit reasons, because it costs more to educate children in non-religious (and public) schools than it does to educate them in religious schools. Further, and as if to suggest *both* facial non-neutrality and an improper motive by the Ohio legislature, the Sixth Circuit claims that private choice funding levels "'typically approximate[ ] the tuition level set by parochial schools [which] reflects subsidies from other sources.'" *Id.* (quoting Martha Minow, *Reforming School Reform*, 68 Fordham L. Rev. 257, 262 (1999)). From this, the Sixth Circuit concludes that the Ohio private choice program "clearly has the impermissible effect of promoting sectarian education." *Simmons-Harris*, 234 F.3d at 959.

A fundamental flaw in the Sixth Circuit's "cost of tuition" comparison is its failure to consider the Cleveland public

---

[7] In his concurrence, Justice Scalia convincingly argues that "motivation" is an elusive and inappropriate subject for inquiry in First Amendment cases. *Church of the Lukumi Babalu Aye*, 508 U.S. at 558 (citing *Fletcher v. Peck*, 6 Cranch 87, 130-131, (1810)(Marshall, C.J.); *United States v. O'Brien*, 391 U.S. 367, 383-384 (1968)). Of course, in this case, the Sixth Circuit cited no evidence that the Ohio Legislature was motivated by a desire to "advance" religion or religious schools. The Sixth Circuit's assumptions also run afoul of this Court's "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." *Mueller*, 463 U.S. 394-95.

schools *themselves*. Undeniably, Cleveland's public schools provide a "public school" choice even if they are not, for whatever reason, currently serving the needs of Cleveland families. (Of course, students remaining in the Cleveland public schools can avail themselves of the program's special tutorial help.) In finding that the choices afforded participants in "this program" are "illusory," the Sixth Circuit found it significant that adjacent public school districts did not join "this program." *Id.* 234 F.3d at 959. The Sixth Circuit's deliberate focus on "this program" rather than *all* educational options available to Cleveland parents—including both Community Schools and the Cleveland public schools themselves—allowed it to conclude that the voucher program had the "effect of promoting sectarian education." *Id.* This case, however, is not about an examination of the choices that *currently and solely* exist in the private choice program. Rather, it is about whether the educational choices made available to low-income Cleveland families suggest that the State of Ohio has abandoned neutrality when it comes to religion. If one chooses, as the Sixth Circuit did, to look at this question as a comparison of funding levels, the clear answer is that Ohio is not promoting religious education.[8]

As the Sixth Circuit points out, the Cleveland public schools *themselves* are backed by $7,097 in public funding. Therefore, they certainly have the financial ability to compete against the participating religious schools and their presumed "subsidies from other sources." *Id.* The fact that the Cleveland public schools are failing is the *raison d'être* of the private choice program. It would be supremely ironic (and

---

[8] The experience in Wisconsin best demonstrates the need to consider the availability of the Cleveland public schools as a "choice" for parents. As discussed *infra* in Section II(D), there is data demonstrating that the Milwaukee public schools have improved as a result of the competitive pressures brought about by the MPCP. For this reason alone, the Sixth Circuit erred in refusing to consider the Cleveland public schools as part of the "decision matrix."

sad indeed) if this fact were used to defeat the constitutionality of the private choice program on the ground that the Cleveland public schools do not provide a "meaningful public school choice." When the State of Ohio allocates $7,097 per pupil for public schools in Cleveland, but only $2,250 for children to use at private religious and non-religious schools, no "reasonable observer" (*Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring)) can conclude that the State is "promoting sectarian schools." *Simmons-Harris*, 234 F.3d at 959.

In conclusion, aside from the voucher program's obvious facial neutrality—which the Sixth Circuit never clearly admits or denies—there is no evidence to suggest that the Ohio legislature's "object" was to advance religion or religious schools. Simply put, the tuition funding level established by the Ohio Legislature—which is equally available to religious and non-religious schools alike—is an insufficient basis upon which to conclude that the Ohio Legislature "gerrymandered" the voucher program to promote religion. Unlike *Church of the Lukumi Babalu Aye*, there is simply nothing "covert" or "subtle" lurking between the lines of the private choice statute to suggest that the Ohio legislature was motivated by a desire to promote religious education. For these reasons, the Sixth Circuit erred in going beyond the plain words of the Ohio statute.

2. *It is of no constitutional significance that 96% of the students in the Cleveland Program attend religious schools.*

As discussed above, the Sixth Circuit concluded that the private choice statute was "not neutral" because it allegedly discourages non-religious school participation. *Simmons-Harris*, 234 F.3d at 959. In support of this conclusion, the Sixth Circuit found it significant that 96% of the students in the Cleveland program attend religious schools. *Id.* This evidence was then used to support the conclusion that the

private choice program is unconstitutional because the "alleged choice . . . is illusory." *Id.* This precise argument was rejected in *Mueller*, *supra*.

In *Mueller*, an Establishment Clause challenge was lodged against a Minnesota statute that permitted taxpayers to deduct expenses incurred for the "tuition, textbooks and transportation of dependents attending elementary or secondary schools." *Mueller*, 463 U.S. at 391. After this Court found the statute to be facially neutral and equally available to private and public school families, the petitioners in *Mueller* claimed that a statistical analysis demonstrated that "96% of the children in private schools . . . attended religiously-affiliated institutions." Therefore, the petitioners argued, the statute in application "primarily benefits religious institutions." *Id.* at 400-01. This Court declined to resolve the statistical dispute.

> We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief.

Id. 463 U.S. at 401.

Mueller could not have provided a clearer statement of the Establishment Clause principle that controls this case: a facially-neutral statute does not become unconstitutional, in practice, because of the decisions of private actors, viewed at a particular point in time. This rule was re-stated in *Witters*, 474 U.S. at 491, n.3 (Powell, J., concurring) and again in

Agostini, 521 U.S. at 229-230. Therefore, the Sixth Circuit should not have relied upon these percentages to conclude that the Ohio private choice program "clearly has the impermissible effect of promoting sectarian schools." *Simmons-Harris*, 234 F.3d at 959.[9]

3. *The Establishment Clause does not mandate any particular "decision matrix."*

In finding that the Ohio private choice program endorses religion in violation of the Establishment Clause, the Sixth Circuit reasoned that "[t]he absence of any meaningful public school choice from the decision matrix yields a limited and restricted palette for parents which is solely caused by state legislative structuring." *Simmons-Harris*, 234 F.3d at 960.[10] These assertions, presumably, provide the basis for the Sixth Circuit's conclusion that the Ohio private choice program does not *really* afford a "genuinely independent and private choice." *Witters*, 474 U.S. at 752. The Sixth Circuit's conclusions are subject to serious question.

First, religious and non-religious schools are subjected to identical treatment by the government. Notably, the Sixth Circuit offers no explanation for how the participating non-religious schools—which account for 18% of the program—are able to overcome this supposed "government limitation." But even assuming that some non-religious schools have declined to participate because of the low tuition level, that decision is not the *government's* decision, and there is no

---

[9] Consistent with *Mueller*, the Wisconsin Supreme Court in a footnote in *Jackson* disposed of a similar attempt to give constitutional significance to the relative percentages of religious/non-religious school participation in the MPCP. *Jackson*, 218 Wis. 2d at 873, n.17, 578 N.W.2d at 619, n.17.

[10] As an aside, because the phrases "decision matrix," "restricted palette," and "meaningful public school choice" are unknown to First Amendment jurisprudence, their use ought to set off alarm bells.

evidence in the record to suggest that the State of Ohio chose the tuition amount for the purpose of limiting the participation of non-religious schools.[11]

Second, with respect to the alleged absence of "meaningful public school choice," the range of options available to public school students is set forth in Judge Ryan's dissent. *Simmons-Harris*, 234 F.3d at 968. As discussed above, the mere fact that adjacent school districts have not yet elected to participate in the voucher program does not leave the public school student without "public school" options. Such a student is free to remain in the public school if it is serving his or her needs. But even if these public school options were not optimal, it is not clear where the Sixth Circuit's objection would fit within First Amendment jurisprudence. The Sixth Circuit's rejection of the private choice program because it allegedly provides a "limited and restricted palette" is not supported by the record and, more importantly, not relevant to the Establishment Clause inquiry. *Id.* at 970-971.

Finally, the Sixth Circuit lost sight of the central Establishment Clause principle in school-aid cases: "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private decisions of beneficiaries." *Witters*, 474 U.S. at 490-491 (Powell, J., concurring). If a statute satisfies this inquiry on its face, the relative number or quality of participating schools should be irrelevant. Indeed, if it were otherwise, the constitutionality of private choice programs would depend on "annual

---

[11] Notably, as set forth in Section II(B), *infra*, the trend in Wisconsin demonstrates that, over time, the participation of non-religious schools has increased. This fact undercuts the Sixth Circuit's assumption about the inability of non-religious schools to compete.

reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Mueller*, 463 U.S. at 401.

For all these reasons, the (allegedly) "limited and restricted palette" of the Ohio private choice program during the 1999-2000 school year is in the nature of an "annual report," and therefore of "little importance" to the Establishment Clause inquiry. *Mueller, supra.*

IV. THE EXCLUSION OF RELIGIOUS SCHOOLS WOULD RAISE SERIOUS QUESTIONS UNDER THE FREE EXERCISE CLAUSE.

In *Zobrest, supra*, this Court stated:

> We have never said that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.

Zobrest, 509 U.S. at 8 (quotation omitted). Here, the Sixth Circuit noted that the "mission statements of these schools reflect that most believe in interweaving religious beliefs with secular subjects." *Simmons-Harris*, 234 F.3d at 949. But this "fact" is not relevant to the Establish-ment Clause inquiry.

In *Zobrest*, the parties stipulated that "the two functions of secular education and advancement of religious values or beliefs are inextricably intertwined throughout the operations of Salpointe." *Id.* at 4, n.1. Notwithstanding that stipulation, this Court rejected the Establishment Clause challenge. As this Court explained in *Mitchell, supra*, "[i]t is well-established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." 530 U.S. at 828. As if to remove any doubt, this Court in *Mitchell* held:

> In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and *other doctrines*

> *of this court* bar it. This doctrine, born of bigotry, should be buried now.

Mitchell, 530 U.S. at 829 (emphasis supplied). The "other doctrines of this court" include the Free Exercise Clause. *Id.* at 835, n.19. Under the Sixth Circuit's reasoning, participating *parents* who wish to send their children to religious schools would be denied the opportunity to do so merely because an allegedly insufficient number of non-religious schools (and neighboring public schools) have chosen (for whatever reason) not to participate in the private choice program.

Imagine if this principle were to be applied in this Court's free speech cases, such as *Good News v. Milford Central School*, *supra*. This Court would have to weigh the relative religious/non-religious content of the speech that occurred at Milford Central. So, for example, if the evidence showed that some percentage (greater than 50%?) of the groups meeting after hours were religious, the State might be found to be advancing religion. Under the Sixth Circuit's reasoning, speech by religious groups would have to be suppressed because, for whatever reason, non-religious groups chose not to take advantage of the forum.

In conclusion, the Sixth Circuit's rejection of participation in the Cleveland private educational choice program by religious schools—which only receive tuition payments if parents choose them—raises serious concerns under the Free Exercise Clause. Indeed, the Cleveland program's alleged Establishment Clause flaw pales in comparison to the Free Exercise Clause flaw in the Sixth Circuit's reasoning in *Simmons-Harris*.

CONCLUSION

For the foregoing reasons, *Amicus* State of Wisconsin respectfully requests that the judgment of the Sixth Circuit be reversed.

Respectfully submitted,

GORDON P. GIAMPIETRO
DONALD A. DAUGHERTY, JR
MICHAEL BEST
& FRIEDRICH LLP
100 East Wisconsin Avenue
Suite 3300
Milwaukee, WI 53202-4108
(414) 271-6560

STEPHEN P. HURLEY *
HURLEY, BURISH
& MILLIKEN, S.C.
301 North Broom Street
Madison, WI 53703-2067
(608) 257-0945

* *Counsel of Record for Amicus State of Wisconsin*